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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,

Appellant,

vs.

AMERICAN BOOKSELLERS, ASS'N, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX — VOL. II
COMPLETE TRIAL TESTIMONY

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THE COURT: All right. And I rule that this is not an appropriate case for this Court to abstain, because there is no peculiar state law that needs interpreting by a state judge. And he won't have any more advantage than I have in trying to come to grips with this.

So, I deny the request that this Court abstain from considering the case out of deference to state courts.

Now, there are motions for summary judgment and other motions here. But I am not so sure that this case lends itself to disposition by summary judgment, because there are fact issues that I probably need to make specific findings of fact on before I can dispose of the case. And one, the importance of displaying a book, magazine, in order to sell it. And maybe

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you can do this by a proffer or stipulation. And two, the expense and difficulty of complying with the new law. And whether any efforts have been made so far to comply with the new law. And maybe not. But you can put on evidence as to what you will do if you didn't have the side bet that had been agreed to where there would be no enforcement until this case was resolved.

And then the commercial feasibility of either building an adult only room or banning minors from the store altogether.

And then what percentage of customers in these stores are adults.

Now, what do you have in the way of evidence that will address those issues? Have you come up with a stipulated record? Or how do you want to handle it?

MR. PLOTKIN: Your Honor, what we would propose to do is we have three witnesses, two of the named plaintiffs who are book store owners, are here in the courtoom today, as well as another individual who has submitted an affidavit, vice-president at Bantam Books to talk about the distribution problems and so forth. I don't believe that their testimony would be terribly lengthy.

In addition, we also have had them bring from their books, from their book stores certain material that we would like to put in as evidence simply to demonstrate the scope and the breadth of the law, at least as we see it, and the kinds of

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material that we believe are not obscene that would be included within the ambit

of this display provision. And that's how we would suggest we proceed at this time.

We have had prior conversations with the Attorney General's Office and they were aware that that was the posture that we were going to take. And at least up until this point they have not objected to that. And in fact, there was some discussion as to whether or not they would want to take depositions of these people prior to the hearing. We did make those people available for depositions, but I was advised that they chose not to. And it was my understanding also that the State was considering the possibility of presenting its own witnesses, but apparently has decided not to present any witnesses in contravention of our position.

So, what we would propose we do at this point, Your Honor, with your permission, is to go ahead and put on our witnesses, put in our exhibits, and then we would rest our case.

THE COURT: All right, fine. That is perfectly agreeable. Is that agreeable with the Commonwealth?

MR. MCLEES: Your Honor, I am John McLees representing the Attorney General's office, I don't believe I have ever had the pleasure of appearing in Your Honor's court before. It is the Attorney General's position, and I believe the position of the other defendants, that evidence is not necessary, that this case can be decided as an issue of law on the basis of the

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pleadings that have been filed.

THE COURT: Well, on the issues that I just enumerated, how do I get a record fleshened out in those areas so that I know what I am coming to grips with, unless it is done by an agreed upon proffer or stipulation.

MR. MCLEES: Well, I am trying to remember all the issues that Your Honor had enumerated. But --

THE COURT: Well here again, the commercial-- I will go backwards on them. What percentage of customers in these stores are adults? And the commercial feasibility of either building an adult only room or banning minors from the stores altogether?

MR. MCLEES: Well, Your Honor, as we have explained in our motion to dismiss, the law on its face does not require what the plaintiffs interpret it as requiring. The plaintiffs interpret

the law as requiring, as forbidding any display of books or materials that are harmful to juveniles.

THE COURT: That's right.

MR. MCLEES: In a place where juveniles are present. And all these factual issues go to proving that they can't do that. As the law is properly interpreted, they don't have to do that. The law does not require them to remove from display altogether in anyplace where juveniles. All it does is require them to display them, to display these materials in such a manner that they are making reasonable good faith efforts to make sure juveniles don't pick them up and examine them and peruse them.

THE COURT: How do I know what sort of problem that is for a book store? It may be the difference in putting them out of business for all I know.

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MR. MCLEES: Well--

THE COURT: And they have to have a staff of trained detectives to spot people that are juveniles, like ABC stores and things of that nature, because, man, you can get prosecuted for selling a beer to a minor so fast it will make your head swim. I would assume, if they had a copy of Playboy in one of these book stores, and a juvenile could come in innocently and pick it up, and there they go.

MR. MCLEES: I think that it is not necessary to take factual evidence for Your Honor to appreciate that merely putting books harmful to juveniles on a rack with a label on the rack that says adults only, and when they, if there comes an occasion when they see a juvenile transgress that sign and pick up that material and examine it and

peruse it, the staff of the store can tell the juvenile that he is not permitted to examine that material.

THE COURT: Well here again, I think that the Fourth Circuit would want a record of some sort in a case of this nature in case it ever goes there, because if I decide it

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without a proper record, all they do is Ping-Pong it back to me and I have to go back to square one and do my work all over again. So, I would just rather do it right in the beginning.

MR. MCLEES: I understand Your Honor's position. I would ask that the record note my exception.

THE COURT: All right, fine. Call your first witness.

MR. PLOTKIN: Plaintiff calls Helen Ross.

NOTE: The witness is sworn.

HELEN G. ROSS, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you tell the Court your name and address, please.

A. Helen Ross.

THE COURT: And spell your last name.

THE WITNESS: R-o-s-s.

THE COURT: Thank you.

THE WITNESS: And I live in McLean, Virginia.

Q. And are you one of the named plaintiffs in this lawsuit?

A. Yes.

Q. Have you ever testified before?

A. No.

Q. You will get the hang of it, just relax. Do you have-- Are you married?

A. Yes.

Q. And would you briefly tell us your educational background.

A. I went to college at Smith in Massachusetts, and then took a year out to be a secretary, and then went to Johns Hopkins and got a Masters in the art of teaching, joint education/history degree.

Q. And following your graduation, what occupation did you--

A. Then I taught in the Montgomery County school system for a few years.

Q. At what level did you teach?

A. High school history.

Q. And did there come a time when you ceased your employment as a teacher

and took up another occupation?

A. Yes.

Q. About when was that?

A. 1975, '76.

Q. What did you do?

A. I went to work for Brentano's, it is a book store and art chain. And tried to learn the book business there with the idea of opening my own book store later.

Q. And what position did you hold while you were employed

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by Brentano's?

A. Well, first I was merely a clerk in the paperback department, and then I became a manager of the store after a year or so.

Q. Where was that store located?

A. The first one was in Spring Valley, Northwest, D.C., and then Georgetown, a different store.

Q. This is in the District of Columbia?

A. Yes, in the District of Columbia.

Q. And at some point did you leave Brentano's for another endeavor?

A. Then I left Brentano's and looked around for a location for my own store.

Q. Did you find one?

A. Yes, an unfortunate one, but I found one in Bethesda, Maryland, and opened a store there, and also found my present location in Old Town, Alexandria.

Q. Are you a member of the American Booksellers Association?

A. Yes.

Q. What is the address of-- What is the name of your book store?

A. Ampersand Books.

Q. What does that mean?

A. The Ampersand is the word for the and sign.

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Q. What is the address of your store?

A. 118 King Street, Alexandria, Virginia.

Q. Would you describe for me the geographic location, the area that your store is located in.

A. It is down in the 100 block of King Street, which is-- Well the 100 and 200 block of King Street are pretty much the best tourist area in Old Town, Alexandria, with mostly shops and restaurants in that area.

Q. Okay. And in what type of building are you located?

A. In a brick mall that is called the Small Mall, which has eight to ten little shops in the mall aside from my own.

Q. What kind of shops are in the mall?

A. They have a plant store, a few gift shops, a deli, a toy store, things like that.

Q. And that mall I take it is open to the public?

A. Yes.

Q. Now, could you describe for the Court the physical layout of your store.

A. Well, the store is about 2,000 square feet, and is roughly rectangular, though with a lot of nooks and crannies here and there.

Q. Is all 2,000 feet devoted to the sale of books?

A. Well, we have a small stock room and two fairly small offices.

Q. Okay. And do you have any windows in your store?

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A. There are windows right on to the street, although the door opens into the mall itself.

Q. There is a window that faces on to King Street?

A. Yes, three.

Q. And then are there in addition other windows inside the mall?

A. Well, actually what we have is three doors, because we used to be three stores, but only one door is open to the public so, the other ones look like windows.

Q. In the window that opens to King Street, what use do you make of that window?

A. Well, right now we are displaying calendars hanging up in the window, and then we try to use our store as a display in itself so when people look in they can see the books that we have.

Q. Okay. With regard to the type of material that you sell in your store, putting aside-- I take it, by the way, you sell books in the book store?

A. Yes.

Q. In addition to books, what other kinds of things do you have there?

A. We have records and tapes and stationery items.

Q. Okay. Now, with regard to the books, what type of book store is this? How would you categorize it?

A. General book store that sells books on a pretty much all

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different kinds of subjects.

Q. How is your store arranged?

A. Mainly by subject matter. So that we-- You know, in different sections which are labeled clearly. We have fiction, reference, biography, sociology, history, psychology, child care, juvenile, what have you.

Q. Approximately how many titles of books do you have in your inventory at any one time?

A. Well, we carry about 15,000 titles. We are out of stock on maybe 10 percent them at any given time.

Q. So, it would be fair to say that at any one time in your store you have got maybe 12 or 13,000 different titles?

A. Yes, that would be fair.

Q. Any you may have more than one copy of each of those titles?

A. Yes. It varies.

Q. And so, if we were talking about total number of books, how many do you think that might be?

A. Oh, heavens. Hard to tell. $100,000 worth, I know that, if that makes any idea.

Q. Do you sell books in your store for children and adolescents?

A. Yes.

Q. You have particular sections for those types of books.

A. Yes, we have a juvenile section.

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Q. Approximately what percent of your sales would you directly attribute to the sale of books in that category?

A. About 10 percent.

Q. Is it common for people under the age of 18 to come into your store?

A. Yes.

Q. Do you encourage them to come into your store?

A. Yes, of course.

Q. Why?

A. Well, for one reason, because I think that illiteracy is a big problem in America, and I think that exposing juveniles to books as early as possible is one of the best ways to combat that problem. And for another reason, they also sometimes make good customers, and quite often are coming in with their parents as a family group.

Q. And I guess young book buyers grow up, or young readers grow up to be book customers later on?

A. We certainly hope so.

Q. With regard to these 15,000 titles in your inventory, who selects the books that you purchase?

A. Well, I select most of them. I also have a manager, Peggy Page, who selects a certain number too.

Q. Would you describe for the Court briefly the selection process.

A. Most of our books are bought directly from publishers,

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and we have publishers representatives that come into our store, and present the new list for the next three to six months. And describe what they are going to do with the particular titles, how much advertising is behind it, what the print run is. Obviously a lot of authors we recognize already and know whether they sell. And we pretty much

go through the list and give them the quantities that we want to order.

Q. When you select, when you decide to purchase one particular book over another, what kind of criteria do you use in making that selection?

A. Well, a number of different criteria based on whether or not the book is going to sell, pretty much. Obviously if it is a known author that we have sold before, than that is something that you would want to buy. How much the publisher is going to back it is another thing. Quite often they will even take a brand new author, the first novel for instance, and they will say that they are going to push this to 50,000 copies and 50,000 ad budget, and that is something that we probably should represent in the store, even though fiction is hard to sell.

Q. Okay. Do you have any employees in your book store?

A. Yes, we have maybe four full-time and two or three part-time. It varies depending on--

Q. Okay. Are any of your employees at present under the age of 18?

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A. I don't believe so, right now.

Q. Have you in the past had any employees under the age of 18?

A. Yes, we quite often have part-time high school students, especially at night and weekends.

Q. What kind of duties would those part-time employees perform?

A. Well, helping customers first and foremost, ringing up the cash register, and then putting away books,

and doing a lot of paperwork that the store has.

Q. Now, this is going to sound like a silly question, but I think it is necessary. Do you display books in your store?

A. Yes.

Q. What do you mean when you use the term display?

A. Well, of course there are different types of display. Actually we pretty much try to have all of our books out on the shelves, which could be considered displaying right there, that they are available to the customer to walk up and find them. We also try to organize the store in such a way that it is easy for them to find them. And then we do do special displays on the side too, which points up certain books more than others.

Q. How are books, why is it important to display books in a way that customers can find them?

A. Well, for one thing, customers tend to be hesitant to ask questions. Some customers will come right up and say, I

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want such and such a book, do you have it. But very many of them kind of wonder around. And I even hear them saying, what do you think, do you think they might have it, do you want to go ask, I don't know, maybe the store doesn't have it. And they are thinking about leaving, and I sort of run up to them and say, can I help you, what would you like, and show them. But it seems to me that we are bound to miss some of that, and I think having the books

organized in a way that they can find themselves is probably the best system.

Q. When you said that you have approximately 15,000 books in your inventory, how many of those are on display at any one time?

A. We would have every title at least out, you know, a certain number of copies. We have very, very few copies in our stockroom, mainly things that we have overstock of out on our floor.

Q. So, it would be fair to say that you have those 15,000 titles out in your inventory and they are out on display in one form or another?

A. Yes.

Q. Do you encourage people to browse in your store?

A. Yes, definitely.

Q. Why?

A. Well, in the first place, we are in an area that a lost of tourists come down, I think a lot of people might even come

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down there that don't even know there is a book store, they get caught by our windows, they come in, they are looking around, that automatically they might not have thought of buying a book at all, and by browsing quite often they pick up a book and buy it. So, just for monetary reasons if nothing else.

Also, I really think that's one of the reasons I like owning a book store, is I like to encourage people to look at books and to read and to get interested in the books. So, it is the type of of atmosphere I like to encourage.

Q. Okay. At some point did you become aware that Virginia had passed an amendment to an existing law that could impact upon your display of books?

A. Yes.

Q. Approximately when and how did you learn about that?

A. Well, actually the first week in July when I got a call from a member of the American Booksellers Association, and they explained what the law was about and said they would be sending me reading material. And I had heard of this type of law before, but I wasn't aware that Virginia was considering it.

Q. Okay. Did you later have an opportunity to review the amendment to that law?

A. Yes.

MR. PLOTKIN: Your Honor, at this time I would like to ask the witness to be allowed to look at a copy of the amendment that is at issue here. I have had this marked as

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Plantiffs' Exhibit 1. It is simply a copy of the amendment.

THE COURT: But she has testified she has looked at it.

MR. PLOTKIN: Yes.

THE COURT: And you vouch the record that that is a verbtaim copy of the amendment?

MR. PLOTKIN: Yes. It is actually a copy of what was attached to our complaint.

THE COURT: All right.

MR. PLOTKIN: I just thought she might have it there in case she

wanted to, I am going to ask her some questions, and I thought she might want to reference it.

THE COURT: But you can hand it to her so that she will have it in front of her.

MR. PLOTKIN: All right.

Q. Are you aware that that amendment provides for criminal penalties for the knowing violation of the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. Have you ever been arrested or charged with a crime?

A. No.

Q. Do you want to avoid criminal presecution in running your business?

A. Of course.

Q. If you were required to comply with that law, do you believe it would affect your ability to display books with pictures of nudity in it?

A. Yes.

Q. Do you believe it would affect your ability to display books with pictures of people engaged in some form of sexual conduct?

A. Yes.

Q. Do you believe it would affect your ability to display books that contained narrative descriptions of sexual conduct?

A. Yes.

Q. And do you believe that it would affect your ability to display books with narrative descriptions of nudity?

A. Yes.

Q. In your estimation, what percentage of your inventory would be included within this display provision?

A. A large percentage, maybe 30 to 50 percent.

Q. Would it include materials that are currently on the hard back and paperback best seller list?

A. Yes, definitely. Mainly fiction.

Q. Would it include books that fall within a category that I believe is referred to as romance?

A. Yes.

Q. Would it affect books that you have in your

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photography department?

A. Yes.

Q. In your art department?

A. Yes.

Q. In your health department?

A. Yes.

Q. In your--

MR. MCLEES: Your Honor, I would object for the record, unless this testimony is limited and there is an understanding this is being admitted just as her belief as to what this law would affect.

MR. PLOTKIN: No, she is relating it to that. She is testifying that this law would have that specific effect upon her business.

THE COURT: Well, your objection is overruled. It is a matter that you can explore on cross-examination.

MR. MCLEES: Very well, Your Honor.

THE COURT: Proceed.

Q. If you were forced to, if you had to comply with the display provisions that are contained in that Virginia law, have you given any consideration to the possible methods that you might explore in order to comply with the law?

A. Yes, we have certainly talked about them. And there doesn't seem to be any really viable way to comply totally with the law and to run the book store in a profitable manner.

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Q. What different alternatives have you considered?

A. Well, one of course is not letting anyone under 18 in the store.

Q. Let me just stop you there and ask you why you think that would not be

a viable option?

A. Well, I mean, first from what I have already mentioned, I think it is important for juveniles to be in book stores, to be looking at books, and that would upset me just from an ethical point of view.

Also, I mean, an awful lot of families come in with their children and you can't very well say, well, the adults can come in, but, you know, park your children out in the mall. And then I assume you would put a sign up that would say adults only, which would probably turn off most of the adults that came down to the Old Town area.

Q. You think that might change their perception of the character of your store?

A. I would think they would automatically assume it was a porno store, which of course it is not.

Q. Are there any other options that you gave any thought to?

A. Well, I suppose you could segregate an area of the store and pick carefully through those books, but you would be talking about then letting maybe the juveniles only go to the juvenile section, and then you would have to even be careful

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about young adult. I don't know how you would get them there so they didn't see the rest of the books that might be on display.

And also, I mean, there is an awful lot of young kids that do go to science fiction, which is, you know, an

iffy section too. Just general fiction, some literature that we have in our adult fiction section. It would be very, very hard to have just an adults only section that was totally separate from the rest of the store. It is just too mixed in with the rest of the content of the different sections.

Q. Would it also mean that you would have to review in a specific personal way each of the titles in your inventory?

A. Well, I suppose--

MR. MCLEES: Once again, Your Honor, I would object unless this is limited to her understanding or her belief of what she would have to do.

THE COURT: All right. With that condition, can you answer the question, Mrs. Ross?

THE WITNESS: Yes. From my understanding of the law, if I didn't knowingly realize that a book might have some harmful content in it, then maybe that wouldn't be a problem.

From just my general background of ten years in the book business, of course, there is an awful lot of books that I don't read that I could have a good idea might have some harmful comment in it. And again, as far as my estimates of

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what might be harmful to juveniles under this law, it is pretty much just based on my experience anyway, I don't know absolutely for sure which things would be considered harmful.

Q. Now, the answers to the questions that I am asking you here

today are based specifically upon your knowledge of your book store at that location and your experience there and at Brentano's, I guess?

A. Yes.

Q. Thank you.

THE COURT: And the way in which you perceive that this statute would affect your business?

THE WITNESS: Yes.

THE COURT: All right.

Q. I am sorry, I think we were talking about partitioning the store. I was going to ask you, assume that you could in some way segregate out these books. Would it require you or someone on your staff to personally go through and make determinations as to which books went where?

A. Yes. I think we would have to make determinations, plus I don't quite understand whether or not you could allow juveniles in any other section in your store. It probably requires somebody from the staff supervising that particular section too versus the rest of the sections of the store, which would be pretty costly.

Q. Okay. Would it interfere with your ability to hire

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part-time clerks or other people under the age of 18, do you think?

A. Yes. I would say that I could not hire anybody under the age of 18. Because just in the general course of events, just opening up books that come from the publishers, then they would be handling books that might be construed

to be against the statute.

Q. Okay. Are there any other methods that you have considered as potential ways for complying with the statute?

A. Well, cutting down on the inventory drastically I think again would pretty much make my book store unprofitable. If you have to cut off half of the best seller hard back and and paperback fiction list, it would be very hard to make a profit in a book store. It is hard anyway.

Q. Would that also again require you to go through and do almost a book by book review?

A. Yes. I would think that would be the best thing I would do as a citizen, trying to comply with the law as fully as possible.

Q. Any idea how long it might take somebody to review-- Let's say 10,000 titles, assume that you can maybe cut out the cooking books or gardening books?

A. Computer books.

Q. Or say 10,000 or 8,000 books, how long would it take someone to look through those to see if they had any

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descriptions of sexual content or nudity?

A. A long time. I can bearly estimate it.

Q. Any other options that you have considered in terms of complying with the statute?

A. Well, I would have to limit my buying very drastically also.

Q. Why is that?

A. Because, again, each publisher's list could very easily

contain a lot of books that could be considered against this law.

Q. On new books, do you have the opportunity to read all the books before you order them?

A. No, definitely not.

Q. And I take it you wouldn't have the time to do all that either?

A. No. And most of the sales representatives don't either. So, they might not even know.

Q. These are the publishers' sales representatives?

A. Yes, the publishers' sales representative.

Q. Now, in his brief the Attorney General suggested that store owners might be able to go around and place tags on books that are harmful to minors with a sign, with a note on it that

says, warning them not to peruse those books. Do you find this suggestion feasible?

A. I don't think so. First place, you would have to

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H.G. Ross - Direct

spend an awful lot of money and time again buying that number of tags and walking around and putting them in books. Plus the type of tag that you could use. I mean, it would have to be something that would stay in the book, that wouldn't fall out, that wouldn't hurt the book when you put it in the pages. And the other thing is that it would probably have to very clearly state why the tag was there. And it seems to me, again, that an awful lot of our customers would sort of recoil from

a book that said that it was an adult only book when it may be just something on health that it would have a description of sexuality or something in it.

Q. The Attorney General also suggested in his papers that stores could create a rack of adult only materials with a sign next to it that juveniles could not peruse this material. Would that be feasible in your store?

A. I would think that the way the law is written, it would be-- It is too broad to be able to do just one rack or even one half of the store practically, just segregating it would be just too difficult, too confusing.

Q. Because of the 30 to 50 percent of the inventory that would be involved?

A. You would have two health sections, to psych sections, two fiction sections, two poetry sections. It would be a very strange way of setting up a store.

MR. PLOTKIN: Your Honor, what I propose to do, and

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maybe to just save a little time, we have some books here that you--

THE COURT: You just state--

MR. PLOTKIN: I could just state them for the record and I could ask her a couple general questions.

THE COURT: And they will be received in evidence and given a designation.

Q. The first book is called American couples by Blumstein, B-l-u-m-s-t-e-i-n, and Schwartz,

S-c-h-w-a-r-t-z. Is this a book that you have removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this book located in?

A. Sociology.

Q. And in your review of this book do you believe that it contained narrative sexual descriptions that might run afoul of this amendment?

A. Yes.

Q. And therefore you would not be able to display this book in a place where minors could get it?

A. Correct.

Q. And there is, I would refer just for the records to pages 242 and 243. I don't think we need to read the material into the record, but just so that we have some specificity as to the

kinds of things we are talking about.

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Plainitffs' Exhibits 3 is a paperback book by Jackie Collins entitled Hollywood Wives. Is this a book that was removed from your store?

A. Yes.

Q. And what section was this located in?

A. Fiction.

Q. And to the best of your knowledge, was this book ever on the best seller list?

A. Yes.

Q. The New York Times best seller list?

A. Yes, it was.

Q. And I think in this book a reference to a page may be somewhat unnecessary, but I will give you 14 and

15 for the record.

Plaintiffs' Exhibit No. 4 is the Penguin Book of Love Poetry. Is this a book that you removed from your store for purposes of this hearing today?

A. Yes.

Q. And what section did this come from?

A. Poetry.

Q. And would you just describe for the record the cover of that book?

A. Well, the cover is from a painting definitely showing nudity in a woman.

Q. A man and a woman apparently embracing?

[44]

H.G. Ross - Direct

A. I think it is supposed to be--

Q. Child?

A. A God. But, yes.

Q. And we would for the record mark pages 112, a poem by D.H. Lawrence, and page 107. Maybe some others.

Plaintiffs' Exhibit 5 is called the Diamond Waterfall, and it is written by Pamela Haines, H-a-i-n-e-s. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this in?

A. In romance.

Q. Okay. And let me just read the pages number out. Pages 44 and 45. And is there another reason why you selected that book as well?

A. Well, the cover does show nudity between a man and a woman.

Q. Plaintiffs' Exhibit 6 is a book entitled The Family Of Woman, edited by Jerry Mason. Is this a book that you

removed from your store to bring here today?

A. Yes.

Q. What section did this come from?

A. Photography.

Q. I would refer for the record-- Well, it is unnumbered, these pages are not numbered, I will let the book speak for

[45]

itself.

Plaintiffs' Exhibit 7 is a book entitled The New Our Bodies, Ourseleves by the Boston Women's Health Book Collective. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section did this come from?

A. Health.

Q. And is there, to the best of your recollection, is there a chapter in this book on sexuality?

A. Yes.

Q. And it has specific references to such things as birth control and masturbation?

A. Yes.

Q. Plaintiffs' Exhibit 8 is a book by John Updike, U-p-d-i-k-e, entitled the Witches of Eastwick, one word. Is this a book that you removed from your store for this hearing?

A. Yes.

Q. And what department did this come from?

A. Well, it is in fiction and best sellers.

Q. This is currently on the paperback best seller list?

A. I believe so.

Q. And I would refer the Court to 126 and 127 of that book.

If I might have one moment, I think I am just about

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done. We have no further questions of this witness.

THE COURT: Cross-examination?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Ross, my name is John McLees, I am from the Virginia Attorney General's Office. You mentioned on direct examination that your store displays books by subject matter?

A. Yes.

Q. And that's to help a customer find the type of book he wants?

A. Yes.

Q. Now, in your affidavit you mentioned that customers, particularly when they are buying or shopping for paperbacks, when they come into the store, they often don't know what specific book they want to buy, is that correct?

A. Yes.

Q. What they do often know is the type of book or the general subject matter?

A. That they like, yes.

Q. And you might have a section in your store on health, you have a section on health books?

A. Yes, we do.

Q. A section on philosophy and religion?

[47]

H.G. Ross - Cross

A. Yes.

Q. History?

A. Yes.

Q. Biography?

A. Yes.

Q. Fiction books. Do you have a section on western novels?

A. They are mixed in with fiction.

Q. If see. How about gothic romance?

A. Romance is a section by itself, not gothic specifically.

Q. Do you have a section on science fiction and fantacy?

A. Yes.

Q. Do you have a section of sex books?

A. No.

Q. You do not. In fiction?

A. What do you consider a sex book?

Q. Well, books that are primarily sexually oriented?

A. Well, of course, see, that could be in health and stuff too. A fiction book that is primarily sexually oriented would be in fiction.

Q. Is it in a separate section?

A. No.

Q. Are they concentrated in one place?

A. Actually our books are arranged by author in fiction.

[48]

H.G. Ross - Cross

Q. They are arranged by author in fiction?

A. Yes.

Q. I see. Do you arrange books by publisher?

A. No.

Q. Just by subject matter and--

A. Not very often.

Q. And then within the subject matter by author?

A. Well, all of our sections are arranged differently. In something like a fiction section or mystery or romance, it is pretty much straight by author. In home arts it would be by the type individual subject, whether it is carpentry or sowing or what have you.

Q. I see. Now, when you receive a book and unpack it and put it on the shelf, how do you determine what section to put it in?

A. Well, sometimes you know instantly just by looking at it by the title. Sometimes you have to look inside the fly leaf for a description of it or on the back of the book for a description of the content of the book. Or we have a card system where every title in our store is on a card, and the section that it should go in is labeled on that card. And if one of our employees is very confused, they can go to the publisher and find that card and figure out where to put it.

Q. Who prepares the cards?

A. Well, all employees prepare the cards.

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H.G. Ross - Cross

Q. In your store?

A. Yes.

Q. The employees in your store prepare the cards?

A. Yes.

Q. So, they review the books in order to prepare the cards?

A. No, they just look over the, whatever purchase order I have written or Peggy has written.

Q. They look over the purchase order in order to prepare the card?

A. Right. After I see a sales representative, we have a list of all the books with the numbers by it of what we bought, and they write up the card by publisher, title, price, author, quantity that we bought, when it is supposed to come out, et cetera, et cetera.

Q. I am not sure I understand. How do they know by looking at the purchase order what section to indicate on the

card that the book should be filed i?

A. If it is something confusing, we write it down.

THE COURT: But when you talk to the sales rep, or your manager, I would assume that there would be some dialogue on whether it is a western or a mystery or a romance, wouldn't it?

THE WITNESS: Yes. Quite often--

THE COURT: If it is Lamour, you know that is going to

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H.G. Ross - Cross

be a western, don't you? Or Ludlum, it is going to be a mystery?

THE WITNESS: Yes. Quite often when we are talking to the sales rep-- I mean, there is some books that I don't buy because there is no moral section to put in in and I can't see where to

display it. But most of the time if there is a question, I would ask them where they would best display it. And there are certain books of course that get in the wrong place. We always have fights over sociology versus history, but why--

Q. I can understand that, I think I would too. Isn't it fair to say that generally from looking at the book, looking at the fly leaf or the back cover, you can tell the subject matter of the book?

A. Yes, generally.

Q. And if you can't, can you talk to the publisher and find out what the general subject matter is?

A. Oh, sure. I can figure it out. I have certain employees that have trouble figuring it out.

Q. Now, you believe, correct me if I am wrong, but you believe that this law, this amendment that was passed, would prohibit you from displaying in your store books that contain a, either a narrative description of sexual conduct or a photograph depicting human nudity, is that correct?

A. Yes, the way I read the law.

[51]

H.G. Ross - Cross

Q. Is that because that's what you believe harmful to juveniles, that's what your believe is harmful to juveniles?

A. Not necessarily my opinion.

Q. You don't believe that a picture, a photograph of human nudity is necessarily harmful to juveniles?

A. Not necessarily.

Q. And you don't believe that descriptions of sexual conduct are necessarily harmful to juveniles?

A. It could be

Q. But not necessarily?

A. Not necessarily.

Q. Some are and some aren't?

A. Well, right. Certainly some I would not sell to a juvenile.

Q. What books wouldn't you sell to a juvenile?

A. That is getting very specific. Certainly-- Well, there is a certain group of books that we get from Grove Press that are Victorian, pretty much old fashioned pornography.

Q. Is Venus In The Country by Anonymous?

A. I would definitely not sell that to a juvenile.

Q. You do sell that in your store though?

A. Yes.

Q. And is A Man With A Maid by Anonymous one of those books also?

A. Yes. I would say anybody by that famous author,

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Anonymous, I would not sell to juvenile.

Q. You do sell that in your store?

A. Yes.

Q. Where are they located in your store?

A. In the fiction section.

Q. How many different shelves are they on?

A. One, I think. It is about half of shelf.

Q. And is it fair to say by looking at the cover of A Man With A Maid and reading the back of the book

that you or I, I dare say anyone on your staff, could tell that this was a sexually oriented book?

A. Yes.

Q. And you wouldn't sell that to a juvenile?

A. No.

Q. That is because do you believe this is harmful to juvenile?

A. I would feel very uncomfortable having my nephews reading that, yes.

Q. Now, the books that Mr. Plotkin has read into the record and you referred to on direct examination, do you believe they are harmful to juveniles?

A. I don't think I would sell Jackie Collins to a juvenile. American Couples, they would never even try to buy. I mean, it is very hard. I really think that a lot of that depends upon

their parent. And I would leave many decisions of

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H.G. Ross - Cross

a lot of book up to the parents of the juveniles.

Q. So, in other words, you believe that there are some books that you can't really tell whether a juvenile should have them or not?

A. Right, especially not knowing the particular juvenile. And also, there are so many different ages of juveniles. I mean, if there is something that might be acceptable for a 17 year old to read that a nine year old shouldn't.

Q. And you believe that that decision should be left to the parents?

A. I think in general that that's the best. That's pretty hard to do, but, yes.

Q. Now, who told you about the provisions of this amendment and what it would mean for you? You mentioned the American Booksellers sent you some literature?

A. Well, I got a copy of the amendment from the American, and the original law from the American Booksellers Association.

Q. And did they send anything else with the law? I presume they sent you a letter a circular or something?

A. A letter and some previous record of cases in other states.

Q. Do you have that material with you?

A. Actually I think I might. It is back in my briefcase, I think, some of it is there.

Q. Could I be permitted to see it?.

A. Sure, if I can find it.

MR. PLOTKIN: Your Honor, I am going to, I would like to inquire as to the relevancy as to this line of questioning.

THE COURT: But the proper objection is that I don't allow discovery on an in-trial setting, and this is exactly what that is. So, if you object to it, I will order her to return it to you.

MR. PLOTKIN: I object.

THE COURT: Marshal, return it to counsel. But I do not permit discovery when I am presiding over an evidentiary hearing.

MR. MCLEES: I will withdraw that.

THE COURT: All right.

MR. MCLEES: Thank you, Mrs. Ross.

BY MR. MCLEES: (Continuing)

Q. Did the-- In addition to the material you received from American Booksellers, who else, if anyone, told you what this law would mean or told you that it would outlaw nudity and descriptions of sexual conduct?

A. Well, actually I read the law myself. I mean, some of it seems--

Q. You concluded that from reading the law that has been introduced into evidence?

A. Yeah. I mean, that's what it says, I think.

[55]

H.G. Ross - Cross

Q. What does it say about what is harmful to juveniles?

A. Well, of course that's one of the problems with the law in general, as

well as the amendment, is that that is extremely difficult to know what harmful to juveniles is.

Q. Do you now what the legal definition of harmful to juveniles is?

A. No.

Q. Has anyone read that to you?.

A. No. Is there one?

THE COURT: It is in paragraph six.

MR. MCLEES: That's correct.

Q. Did anyone read that to you?

A. A separate legal definition of harmful to juveniles?

Q. Yes.

A. No.

Q. No one ever told you that there was one, did they?

A. I don't know. Not that I remember. What is the legal definition?

Q. Mrs. Ross--

THE COURT: Don't waste my time on that. It is in the statute. And those are legal arguments. We are here now to fleshen out the record from an evidentiary standpoint.

Q. You believe, Mrs. Ross, that you would have to remove books of the type that you have referred to that you brought here today--

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H.G. Ross - Cross

A. I believe I would have to seriously consider it if I wanted to be in line with the law.

Q. And in addition to that, 30 to 50 percent I believe you said of your inventory you would be concerned with?

A. It would have to come under heavy scrutiny, yes.

Q. Do you believe that any of the books that you have brought today when

taken as a whole predominantly appeal to the prurient interest of juvenile?

A. Well, things like Our Bodies, Ourselves, the type of thing I have stopped teen-age kids from looking through, things like that, and pregnancy and child birth and things in the child care section just because of the pictures. I don't think they would probably pick up the Penguin Book of Love Poetry.

Q. The book, Our Bodies, Ourseleves and pregnancy and child birth, do you believe that they have scientific value or any other kind of value for juveniles?

A. Well, they have values for people in general that most juveniles are too young to get value out of them right at that time.

Q. Well, apart from very young juveniles, you believe that juveniles in general can get some scientific value from books like that?

A. Out of parts of them, yes.

Q. Are you aware that there has been a law on the books for years that makes it illegal for you to sell books to

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H.G. Ross - Cross

juveniles that are harmful to juveniles?

A. It is this law without the amendment.

Q. You are aware that that has been the law for years?

A. That that was the law, yes. I had not read it before, but I have now.

Q. And what-- And I assume you have been trying to comply with that law?

A. Well, except for I hadn't read it. But I certainly tried to comply with, I knew that there was a pornography law in the State of Virginia, and I tried to use good sense in complying with it. I never called for a copy of it.

Q. What books in your store have you refused to sell to juveniles?

A. Actually the matter has never arisen. The store seems to have an atmosphere that does not encourage juveniles to try to come up to buy books that might be really out of line for them to buy.

MR. MCLEES: Your Honor, I would move--

THE COURT: They will be received in evidence and marked as Defendants' Exhibits 1 and 2.

Marshal, hand them to the deputy clerk.

MR. MCLEES: I have nothing further.

THE COURT: Mrs. Ross, you may stand down. There is no need for any redirect on it.

NOTE: The witness stood down

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THE COURT: Call your next witness.

MR. PLOTKIN: As plaintiffs' next witness, Your Honor, we would call Mrs. Heather Florence.

THE COURT: Now, to what extent will this be cumulative of what you have already put on?

MR. PLOTKIN: I don't believe it will be cumulative at all, because this witness is not a book seller. She is someone involved from the publishing

end of it. And with the Court's permission, just in the, in our spirit of dividing up some of the work, I would ask the Court to allow Mr. Bamberger to conduct the examination.

THE COURT: Certainly, no problem.

NOTE: The witness is sworn.

HEATHER GRANT FLORENCE, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBERGER:

Q. Mrs. Florence, would you please state your full name for the Court.

A. Heather, H-e-a-t-h-e-r, middle name Grant, G-r-a-n-t, last name F-l-o-r-e-n-c-e.

Q. Where do you reside, Mrs. Florence?

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H.G. Florence - Direct

A. Connecticut.

Q. And what is your present occupation?

A. I am a vice-president and the general counsel of Bantam Books.

Q. Mrs. Florence, are you married?

A. Yes, I am.

Q. Do you have any children?

A. Yes, I do.

Q. How many and of what age and sex?

A. I have one son who is six-and-a-half, just started second grade.

Q. Would you please describe to the Court your education.

A. After completing public high school I went to Radcliffe College where I received a B.A., magna cum laude. And

then went to the Columbia Law School in New York and got a J.D. degree. That's the extent of it.

Q. When you completed law school, what did you do then?

A. I went into the private practice of law as an associate in the law firm in New York City of Weil, Gotshal and Manges. That was my first job.

Q. How long were you with that firm?

A. I was associated with that firm approximately five years.

Q. And what was your next business employment?

A. I went to another law firm in New York, Lankenau

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L-a-n-k-e-n-a-u, Kovner, K-o-v-n-e-r,

and Bickford, B-i-c-k-f-o-r-d, I was an associate and then became a member of the firm.

Q. And when you left that firm, what post did you then take?

A. I then went to Bantam Books as vice-president and general counsel.

Q. And you are presently employed by Bantam Books?

A. Yes.

Q. In what capacity?

A. I am still vice-president and general counsel. I have a few additional duties as well.

Q. Prior to your joining Bantam Books, in the practice of law did you work at all in the area of publishing?

A. Yes, I did.

Q. What was the nature of that practice?

A. Well, in addition to doing some work for individual publishers who were clients of the law firms I worked for, I also did work for the Association of American Publishers. I served as the counsel to the Freedom to Read Committee of that trade association.

Q. Do you know that the Association of American Publishers which you just mentioned is one of the plaintiffs in this action?

A. Yes, I do.

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H.G. Florence - Direct

Q. Is Bantam Books a member of that association?

A. Yes, it is.

Q. Would you describe your present duties with Bantam Books, please.

A. Well, in my capacity as the--

THE COURT: Counsel, this has been interesting, but you have about burned it out. Let's more on to the issues that are germane to this case immediately.

MR. BAMBERGER: Yes, Your Honor.

Q. Would you please describe to us the range and nature of material published by Bantam Books.

A. Bantam publishes books in a number of formats; hard cover recently, traditionally only paperback books. We publish all sizes of books, oversized, and most of our books are rack size, mass market, paperback books. We publish approximately 50 to 60 different titles every single month, comes out over three to 400 titles a year. And the range of subject matters and age levels is very extensive.

Q. Do you publish both original works and reprints of hard cover books?

A. Yes. Our paperback line is composed of reprints of hard cover books that we have published and that other publishers first published in hard cover, and also a number of books that are published for the first time in paperback which we call originals.

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H.G. Florence - Direct

Q. Approximately how many retail outlets stock publications of Bantam Books?

A. I think current estimates are probably close to 100,000 within the United States and Canada.

Q. Approximately how many of those would you classify as traditional book stores?

A. Well, it is hard to be precise. But a very small percentage, I would say maybe in the, I don't know 10, 20 percent range.

Q. What type of non-book store retail outlets stock publications of Bantam Books?

A. Our books are available for sale in pretty much every kind of retail outlet that has newspapers and magazines as well. In addition to others. We find our books in super markets, in airports, train stations, lobbies of many office buildings. Pretty much anyplace that candy and chewing gum are sold.

Q. Does Bantam Books sell directly to these non-book store retail outlets?

A. No. Our books are sold to those outlets predominantly through middlemen, wholesalers and jobbers.

Q. How do the middlemen choose the books for those retail outlets?

A. Well, we do have, Bantam has sales representatives who call on those

wholesale customers on a monthly basis and go over the Bantam list and try and persuade them to take as many

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of each title as they can.

Q. From the point of view of the publisher, what is the importance of display for a paperback book in terms of sales?

A. Well, it is really critical. More and more these outlets do show all of the books face out, if you notice, in any airport or similar-type rack. instead of just showing the spines of books, they show the face out. And in the selling process, our key tool that our sales people use is a copy of what we are going to use as the cover for the book. The sales representative solicit their orders three to four months before we actually ship the books. And what

they use as solicitation materials for every book is a copy of what the cover will look like to try and persuade the customer that in fact this will be attractive, it is likely to create attention at retail displays, and is likely then to sell through.

Q. So, we consider the display a critical ingredient of ultimately making the sale to the consumer, and we start pushing the attractiveness of the cover with the customer immediately.

Q. Do original paperback books generally receive notice in book reviews such as the Washington Post book section, for example?

A. They are very seldom reviewed. I am not that familiar, I am afraid, with the Washington Post. The New York Times book review devotes a fraction, about less than a page, to brief

mention of paperback books. Mostly they review only hard covers, and I think that is quite typical of most of the book reviews and also daily reviews.

Q. So, how do the prospective reviewers find out about original paperbacks that you publish?

A. They see them on display where they go to work, where they ride trains, where they get on buses.

Q. In your capacity as advisor to your employer, Bantam Books, is one of your functions to advise them with respect to legal problems which may arise out of manuscripts which are proposed to be published?

A. Yes.

Q. If I could hand the witness a copy of Exhibit 1, if I may. And I would like also to hand up to the

witness the definition of harmful to minors which is not in the amendment.

THE COURT: You mean section six, harmful to juveniles?

MR. BAMBERGER: Harmful to juveniles, yes.

THE COURT: Well, just ask her a question and let's see. I have a copy of it in front of me.

Q. Mrs. Florence, have you had a chance prior to this time to review the amendment to the Virginia statute?

A. Yes, I have.

Q. Which is at issue in this case?

A. Yes, I have.

Q. In your capacity as advisor to your employer, could

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H.G. Florence - Direct

you apply that standard to manuscripts coming into Bantam Books and advise them

whether or not the books could be freely sold, freely displayed in the Commonwealth of Virginia?

MR. MCLEES: Objection, Your Honor, relevancy.

THE COURT: The objection is overruled.

A. Well, I would find it virtually impossible to do that apart from perhaps using an educated or knowledgeable guess as to what would fall within the statute, which is difficult. It would be a monumental task. It would really require reading probably 90 percent of the fiction titles that come through the house, and probably about 25 percent of the nonfiction titles. And it would be virtually impossible to get that much work done in my department.

Mr. BAMBERGER: I have no further questions.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Florence, since you advice your employer on First Amendment issues, I presume you are aware that there, there is and has been for several years in Virginia a law prohibiting the sale to juveniles of materials that are harmful to juveniles?

A. I am aware that such a law exists in many states. And

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H.G. Florence - Cross

I was not particularly aware that there was one in Virginia, but I am aware that those laws exist, and our books are

distributed nationwide. So, for all intents and purposes, yes.

Q. And you are aware that the same definition of harmful to juveniles that counsel showed you a few minutes ago is the definition that is used in Virginia and many other states?

A. It is.

Q. In those laws forbidding the sale of materials of that sort to juveniles?

A. Yes.

Q. And I am sure in your duties you have advised your employer concerning what books can be sold to juveniles, haven't you?

A. Actually I have never had the need to since my employer is not in the retail end of the business. And the only books that are clearly directed to a juvenile audience, we do have a large

young reader publishing program, would, based on the editorial selection of that material, not contain matter which is defined as harmful to juveniles. So, it has never arisen for me.

Q. So, the matter has never arisen. Your employer doesn't make a practice then of advising retailers that buy Bantam Books what books can be sold to juveniles or not?

A. It is certainly not our practice from a legal standpoint. I believe that when our sales representatives

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pitch the list, they try and be as clear as they can to the prospective customer as to who the likely audience is and who might want to read the book.

Q. Do they tell them that it can be sold to juveniles or it can't?

A. I imagine that does not come up in discussion.

MR. MCLEES: Very well. Nothing further, Your Honor.

THE COURT: Fine. Thank you, Mrs. Florence, you may stand down.

NOTE: The witness stood down.

THE COURT: Call your next witness.

MR. PLOTKIN: At this time, Your Honor, I would like to call Carol Johnson.

THE COURT: Come forward, Mrs. Johnson.

NOTE: The witness is sworn.

MR. PLOTKIN: Your Honor, again in the interests of expediency, I will try to tailor this to material that is unique to Mrs. Johnson. I will try to

avoid, to the extent I can, some of the corroborative or the cumulative nature of the prior testimony. And I am afraid a little of it--

THE COURT: She has heard most of it, so if you want to ask a question that embraces things that she has heard and have her then endorse it, I will permit that.

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C. JOHNSON - Direct

CAROL JOHNSON, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you state your name and address for the record, please.

A. Carol Johnson. I live in Arlington, Virginia.

Q. Are you one of the named plaintiffs in this lawsuit?

A. Yes, I am.

Q. How long have you lived in Arlington?

A. 17 years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many?

A. Two, in the Arlington school system.

Q. And their ages?

A. Almost 12 nd almost 16.

Q. And what is your present occupation?

A. I am owner/manager of Books Unlimited in Arlington, Virginia.

THE COURT: Of which?

THE WITNESS: Books Unlimited.

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C. Johnson - Direct

Q. Mrs. Johnson, you might want to lean forward a little bit because we are having a little difficulty picking up your voice.

A. How is that?

Q. Fine. How long have you owned Books Unlimited?

A. Ten years.

Q. And are you a member of the American Booksellers Association?

A. Yes, I am.

Q. Would you describe the geographic location of your store.

A. We are located in the Clarendon section of Arlington. Clarendon was the original central business district in Arlington, and it is now under a great deal of reorganization and redevelopment. It is a very interesting neighborhood. We have a lot of ethnic restaurants. We

have a wonderful baby furniture store next door, a big Sears across the street. A nice neighborhood directly behind us. We have a park three blocks away. We have a large elementary school six blocks away. We have a lot of walk-in traffic.

Q. Okay. Would you describe the size and the physical layout of your store.

A. About 1200 square feet of selling space, 150 to 200 in the back room. It is very long and narrow. As you walk in the front door, there are two alcoves directly behind you, they

have big picture windows that are visible from the street. The rest of the layout of the store, there are floor to ceiling book shelves as you walk down, with a central counter. And then

about half way down the store there are little like library stacks, and then more floor to ceiling shelving in the back.

Q. And would you describe for the Court the way your inventory is organized.

A. By subject matter. And then as a general rule, in alphabetical order by author within the subject matter, except where it doesn't fit.

Q. And you heard Mrs. Ross testify earlier about her store was organized into different subject materials?

A. Right.

Q. And so forth. Would you generally adopt that--

A. Everybody has their own system, but we have mental health, parenting, biography, history, best seller, new releases, science fiction, everything.

Q. Okay, thank you. Is you store open to minors?

A. Absolutely.

Q. What percent of your sales occur in your children and young adult books?

A. 40 percent of our sales annually are from the children's section.

Q. And what percentage of your inventory would you

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C. Johnson - Direct

consider to be in your children's section?

A. Percentage of inventory? It is 40 percent, the figure is from the same source.

Q. Okay. Do you encourage persons under 18 to enter your store?

A. Absolutely.

Q. Why?

A. Well, it is very important to us. My original partner and I would have opened a children's store if we hadn't had such a broad base in books ourselves. My whole background is in working with children, and we wanted to have a store that would offer things that we couldn't find in other stores around the area. We don't just sell children's books, we sell children's records, we sell toys, we sell games, puzzles, all sorts of things pertaining to children.

Q. Did you try any special measures to promote your store as a children's book store even though you don't call it a children's book store?

A. Absolutely. We do about 25 school bookfairs a year. Some of them are public elementary schools, some are private, some are preschools. We also

do special interest bookfairs. We do, I do story telling in the stores sometime. I have told stories on public television on cable, I mean, not on public television. We also, I have a member of my staff who gives lectures on special children's subjects to a lot of preschools

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and some elementary schools.

Q. Do you have a special section for young adults?

A. Yes, I do, a large one.

Q. Why?

A. My children are older now and I am interested in young adult literature more so than I was when I first got started. There is a lot of really good literature.

Q. I take it in the store where you are located, you don't lump all the children's books in one section?

A. No. It is a very large section, so that I have divided it up.

Q. What types of books are located in the young adult section?

A. In the young adult section it is almost entirely fiction. We figure that by the time the children are designated as young adults, they pretty much have the run of the store for nonfiction items.

Q. What age would you think of as being young adults for purposes of that?

A. 12 up, 12 to 18.

Q. Are there, in the books that are contained in the young adult sections, are there references in some of those books to sexual conduct?

A. Yes, there are.

Q. Are there references or are there pictures of nudity,

human nudity in those books?

A. No, not in those books, no pictures.

Q. Do you have a section on science fiction?

A. Yes.

Q. Are those books popular with young readers?

A. Very.

Q. Do some of the science fiction titles contain narative descriptions of sexual conduct?

A. Absolutely.

Q. Do you carry books known as best sellers?

A. Yes.

Q. And do any of those books contain discussions of sexual conduct?

A. As far as I know, yes.

Q. And you have a section on mystery and suspense?

A. Yes.

Q. Do those books contain discussions--

A. Yes.

Q. Have you ever refused to sell a book to a juvenile?

A. Yes.

Q. Why?

A. Mainly because I thought they were too young for the material that they brought up to the counter. Several times I have refused to sell Judy Blume Forever without a note from their parents.

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C. Johnson - Direct

Q. And that is a decision-- How would you make a decision as to whether or not to sell a particular book to a particular individual?

A. Arbitrarily. I am a parent, and I would just make that decision as a parent.

Q. And would you make that in the context of somebody coming forward to the counter and handing you a book that they wanted to purchase?

A. Yes. I even refused to sell Forever to her parent because I thought her child was too young, and she wrote me a letter of thanks afterwards.

Q. Who selects the books for your inventory?

A. I do 90 to 95 percent of my buying.

Q. How many titles do you have in your inventory?

A. 15 to 20,000.

Q. Do you employ any people under the age of 18 as did Mrs. Ross?

A. Yes.

Q. And would they conduct the similar kinds of duties that she described?

A. They do everything, yeah, I mean everything but buy and make any kind of financial decisions, yes. It is a small store, they have to pull their weight.

Q. I take it like Mrs. Ross you display books in your store?

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A. Yes.

Q. How do you display them, what methods do you use?

A. Because I have a small space and so many titles, some of the books are face out, many more of them are spine out. But they are available, as many as I can, at eye level, and the rest within easy reach of the hand all along the shelves.

Q. Why is that important?

A. Sometimes there is only one of us manning the store, but even when there are three of us, we are very likely to be busy with customers or the telephone or the cash register. And so, for practical purposes it is necessary for customers to do their own shopping. Plus they pick up things, you know, that we wouldn't imagine they are interested in if they are just allowed to wonder around.

Q. Did there come a time when you learned that Virginia had passed a law that might impact upon your ability to display certain books?

A. Yes.

Q. When was that and how did you come to find out about it?

A. It was the week before it went into effect, and I was contacted by the

media coalition from the ABA. But I knew it was coming since I had been reading about it.

Q. Have you since had an opportunity to read the law?

A. Yes.

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C. Johnson - Direct

Q. If you were required to comply with the law, would it have any impact on your ability to display books in your store?

A. I think it would have a tremendous impact.

Q. Why?

A. Because so much of my business is done with juveniles. Because I have, I have classes coming into my stores as a field trip from schools. And if I was worried about what I have on the shelf, I would have to say that they couldn't do that anymore.

Q. Can you estimate for the Court what percentage of your inventory might fall within the purview of the display requirements?

A. It would be less than Helen's because so much of it is children's, but I would think that maybe up to 30 percent.

Q. Do you know that it is a crime to violate the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. If you were forced to comply with these display provisions, what options might be available to you? I take it you heard Mrs. Ross testify about the options that she had available. Do you think it might require you to remove books from--

A. I do. And I think it would require me to greatly

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tailor the way that I buy new books.

Q. In what sense?

A. Well, not all the books that you buy come from a publisher representatives' sales pitch. A lot of them just come from picking things up off of lists. And it is very difficult from reading a list to know what the contents of a book is, and you would really just have to leave out everything you couldn't ask questions about.

Q. Would it be possible for you to go around and put special tags on the books that you thought might be potentially covered by this law?

A. It would be very difficult to know which books to put tags on. Where I had an inkling, I would hate to pull,

I would hate for the people to think that I have adults only books in my stores since they think of it as a family neighborhood book store.

Q. I take it, however, you do have some books that you would consider, certainly consider as being for adults only?

A. Yes, certainly.

Q. Do you have some of those Anonymous books that are referred to?

A. Yes.

Q. By the way, are the all Anonymous books grouped together?

A. Yes.

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C. Johnson - Direct

Q. Is that because the author's first name begins with A?

A. That's not why. Some of them have real authors.

Q. Do you believe that the removal, if you had to remove any books from your store or restricted your buying of titles, that would put you at any competitive disadvantage?

A. Absolutely.

Q. Why?

A. It is hard enough to compete as an independent book seller with the likes of Crown, and they operate area wide. So that if they had to comply with the law in Virginia, they wouldn't have to comply with it in the District and Maryland. That alone is difficult. And then we would have to be competing with other book stores in the District and Maryland who didn't have to comply with the law. We would have to pull best sellers and they wouldn't have to.

Q. I have some books here that we removed, that you removed from the

shelves of your book store, is that correct?

A. Yes.

Q. Each of these are books that are on display in your store?

A. Yes.

Q. Plaintiffs' Exhibit 9 is a book called Am I Normal, by Jeanne Betancourt, B-e-t-a-n-c-o-u-r-t, an illustrated guide to your changing body. Why do you think this book, you would not be permitted to display this book?

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C. Johnson - Direct

A. It shows male nudity.

Q. And is this a book that is specifically designed for adolescents--

A. 12 to 14 year olds, yes.

Q. Plaintiffs' Exhibit 10 is entitled Changing Bodies, Changing

Lives, by Ruth Bell and others. Do you believe that you would have some restrictions on your ability to display this book?

A. Yes, I do.

Q. Why?

A. Well, aside from pictures of nudity in there, there a great deal of sexual description on puberty and teenage sex.

Q. Is this a book again designed primarily for adolescent readers?

A. Yes.

Q. Plaintiffs' Exhibit 11 I think you have alluded to this earlier, it is entitled Forever, by Judy Blume, B-l-u-m-e. Is this a book that you feel you might be prohibited from displaying?

A. Absolutely.

Q. Why?

A. There is quite graphic descriptions of first sexual encounter in the book.

Q. And again, what audience is this book targeted at?

A. Young adults, I would say 14 and up.

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C. Johnson - Direct

Q. Lord Foul's Bane by Stephen R. Donaldson, Plaintiffs' Exhibit 12. Why do you--

A. There is a graphic description of rape in it that is crucial-- It is a series of 2,000 pages, it is six books, very popular science fiction.

Q. Plaintiffs' Exhibit 13, entitled Lucifer's Hammer by Larry Niven and Jerry Pournelle, P-o-u-r-n-e-l-l-e. Why do you think you would be restricted from displaying this book?

A. Again, there is sexual content.

Q. And would that be on pages 66 and 67?

A. I think so, yes.

Q. Tender Is The Storm by Johanna Lindsey, Plaintiffs' Exhibit 14. Why--

A. That's because of the cover.

Q. I am sorry, what about the cover?

A. It is male nudity again, rather graphic.

Q. Plaintiffs' Exhibit 15, The Facts of Love by Alex Comfort and Jane Comfort. Why do you think you would have restrictions--

A. Again descriptions of the sexual act as well as pictures. Nudity.

Q. And again, what audience is this book targetted for?

A. Young adults.

Q. Plaintiffs' Exhibit 17, Where Do Babies Come From by Margaret Sheffield, S-h-e-f-f-i-e-l-d. Why do you think that

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C. Johnson - Direct

you would have trouble displaying this?

A. There are fairly graphic pictures in there. They are lyrically done, but they are fairly graphic.

Q. Do you believe that some of the material that we have just reviewed here are appropriate for older teen-agers, but yet might be harmful for younger children?

A. Yes, I do.

Q. Why?

A. Well, younger kids are just not ready for the information that is involved. Most of the narrative information, the pictures they are just

going to titter over, but I think some of the naratives they are just not ready for that kind of information yet. And it is a decision their parents should make with them.

Q. Do you believe that each one of these books or any of these books are necessarily harmful to juveniles?

A. I do not. But someone else might.

Q. And why is it that you would then consider them to be covered by these display provisions?

A. Just because I don't know who's definition of harmful I am to use. And to be safe, I would have to pull them.

MR. PLOTKIN: I have no further questions of this witness.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Johnson, do I understand correctly that you believe that this law, this amendment that we are here about, would prohibit you from displaying in your store any book that has a verbal description of sexual conduct or contains a photograph or a picture of human nudity?

A. Pretty much.

Q. Is that correct?

A. Yeah.

Q. Who told you that?

A. I read the law.

Q. Did you read the definition of harmful to juveniles?

A. No, that was not included in--

Q. It wasn't included in the material that was sent to you?

A. I don't believe so.

Q. Did you know there was a legal definition of harmful to juveniles?

A. No. I mean-- Yes, I guess I assumed there was, but I hadn't read it.

Q. But you didn't know what it was?

A. No.

Q. Now, you have mentioned a figure I believe that you gave was maybe 30 percent of your inventory would be affected

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C. Johnson - Cross

by this law?

A. Possibly.

Q. And that's because-- Do you believe that 30 percent of your inventory is harmful to juveniles?

A. I said up to 30 percent.

Q. Do you believe up to 30 percent?

A. No.

Q. You don't believe it is harmful?

A. No.

Q. But it is your belief that it might come under this law?

A. Sure.

Q. Who do you think under this law will determine what is harmful to juveniles?

A. I would assume it would be the public if there were a complaint, then someone might follow-up on it.

Q. What would happen in your understanding if they followed up on it?

A. I suppose I could be taken to court.

Q. Are you aware that before you could be charged with a violation of this law, a neutral judicial officer would have to find that there was probable cause to believe that the book in question met the legal definition of harmful to juveniles?

A. No, I was not aware of that.

Q. Are you aware that before you could be convicted of

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C. Johnson - Cross

violating this law, you would have a right to have a jury of 12 ordinary people from your community decide whether they were convinced beyond a reasonable doubt that the material that was sold was harmful to juveniles under the legal definition?

A. No.

Q. You were not aware of that?

A. Not explicitly aware, no.

Q. What percentage of your inventory predominantly appeals to the prurient interests of juveniles?

A. Well, I would have no idea.

Q. A large percentage, a small percentage?

A. Probably a very small percentage. Every once in awhile I have to take a book out of the hands of someone, but a very small percentage.

Q. What books do you take out of the hands of someone?

A. The Joy of Sex mostly.

Q. And whose hands do you take that out of?

A. Juveniles.

Q. I see. In your store?

A. Sure.

Q. If they pick it up and peruse it?

A. Yes. Mostly my own children back when I first started, but others included, Yes.

Q. Now, what about The Gardens of the Night by Anonymous? You sell that in your store, don't you?

A. No, probably not. I don't keep real close track of those titles.

Q. You do sell books by Anonymous published by Grove Press, don't you?

A. Some of them, sure.

Q. Comparable to this?

A. Comparable.

Q. What about Venus Unbound by Anonymous, you do sell that, don't you?

A. Maybe, possibly.

Q. That's also Grove Press, Anonymous, and you sell books comparable?

A. Some of them, yes.

Q. Do you sell them to juveniles?

A. No.

Q. If juveniles come into your store and pick those up and leaf through them and read them, do you allow them to do that?

A. It has never happened, to my knowledge.

Q. Where are they displayed in the store?

A. In with the books on sex, with the books on sex education.

Q. Do you consider that to be sex education?

A. No, but I keep them away from fiction so that I can keep an eye on them.

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C. Johnson - Cross

Q. What do you consider these Grove Press Anonymous books to be if they are not sex education?

A. Fantasy material.

Q. Now, the books that Mr. Plotkin referred to and that you have brought here today, do you believe they are harmful to juveniles?

A. I believe someone could say that they were, could feel that they were, yes.

Q. Well, let's not, let's not talk about what someone could say. Let's talk about your belief about these books. Do you believe that Where Do Babies Come From by Margaret Sheffield, do you agree that that is lacking in serious literary or artistic or political or scientific value for juveniles?

A. No.

Q. What about The Facts of Love, do you believe that is lacking in serious literary or scientific value for juveniles?

MR. PLOTKIN: I would like to inquire as to what age group we are talking about.

THE COURT: Young adults. Do you want to plug that in, because that is the audience that we are basically talking about.

THE WITNESS: Well, there are even younger children.

MR. MCLEES: Your Honor, it would be our position that legally that is irrelevant.

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C. Johnson - Cross

THE COURT: All right.

Q. What about Changing Bodies, Changing Lives. Do you believe that that is lacking, taken as a whole, lacking in serious literary or scientific value for children?

A. I do not believe that. But I think that it could be harmful to certain children.

Q. It could be harmful, you believe it could be harmful to certain children?

A. Sure.

Q. But you don't believe it is lacking in serious scientific value for children?

A. No.

Q. Now, you mentioned Lord Foul's Bane, I believe that is one of these books also?

A. Yes.

Q. That's a series of six books?

A. Yes, six.

Q. And it has a total of 2,000 pages.

A. Yes. I read it.

Q. And do you sell that to children?

A. I use a lot of judgment with that, because of the rape in the first book.

Q. Now, this rape in the first book is the reason that you feel that under this law you wouldn't be able to display that book?

A. Yes.

Q. How many pages doe that rape take up?

A. I don't remember.

Q. Two or three?

A. Maybe longer.

Q. More than ten?

A. Maybe not.

Q. Probably not. More than 15?

A. Around that, probably.

Q. Out of 2,000 pages? Could you give a verbal response please for the benefit of the court reporter?

A. Yes.

Q. You mentioned Judy Blume's book Forever, that you didn't sell that to juveniles, is that right?

A. Well no, what is the definition of juveniles? I do sell it to young adults.

THE COURT: Anyone under 18 as I read the statute.

THE WITNESS: Of course I sell that to juveniles, but I don't sell it to anyone who I think is too immature to read it.

Q. Why?

A. That's the parent in me, I don't think they are ready.

Q. Well, what is it about that book that they are not ready for?

Q. There is quite a lot of graphic sexual description

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C. Johnson - Cross

that seems appropriate for young adults, it is about making choices.

Q. About making choices about sexual conduct?

A. Yes.

Q. Now, when you make a decision like that that you could sell a book like that to one person under 18 but not to another given person under 18, what factors do you take into consideration?

MR. PLOTKIN: I would just like to object to this line of questioning, for one basic reason. The questions are all about whether or not these books would be sold. And we are not here challenging the sale, the fact that Virginia has decided to make illegal the sale of certain kinds of books. What we are really concerned about here is whether or not these books can be displayed in a place where children can come in.

THE COURT: And where the majority of your customers are adult.

MR. PLOTKIN: And these questions about whether or not she would sell a particular book are interesting,

but they don't really go to whether or not they can be displayed in an area where children can see them.

THE COURT: The objection is sustained.

MR. MCLEES: Well, Your Honor, may I respond to that?

THE COURT: Yes.

MR. MCLEES: The objection that counsel makes is

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C. Johnson - Cross

interesting in itself because it points up one of the basic flaws in their case. And that is that the same criteria, the harmful to juveniles criteria, have been on the books for years forbidding the sale of--

THE COURT: The sale, right. But their complaint is that you have the overbreadth of this, that you can't

display things to an adult audience realizing that you would never sell them to a juvenile.

MR. MCLEES: Our point at this point, Your Honor, is that we are getting at what books the store owner actually perceives are harmful to juveniles and what books they believe should not be, should not be accessible to juveniles.

The criterion is the same whether it is sold or whether it is displayed under the law. They are under the impression that there is going to be some new criterion, and they have talked about I think these books would be affected by the law. The point is, these books are not going to be affected by the law.

THE COURT: Well, I mean, that assumes that every sheriff and law

enforcement person in the State of Virginia shares a common set of values and that they will ignore the displaying of these fairly sexually explicit books where juveniles can see them.

MR. PLOTKIN: Your Honor, if I might just make one additional point in response to what Mr. McLees has said. I

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C. Johnson - Cross

think there is a another fundamental difference that occurs in a sale situation as opposed to a display situation, and that is in a sale situation you have in front of you a particular book and a particular child. The book seller--

THE COURT: That is true.

MR. PLOTKIN: The book seller can make that judgment right then and there. In the display situation, the

offense of displaying, if you will, of displaying this book occurs before any juveniles walks into the store.

THE COURT: The display is having a racey sort of a title on the spine of the book that he can't see anything except the title which excites him and he grabs it up and starts looking at it, and then the cats out of the bag and off to jail you go.

MR. PLOTKIN: Thank you, Your Honor.

MR. MCLEES: Your Honor, to get back to the question that I asked, which was pertaining to what criterion she takes into consideration in deciding what books are suitable for juveniles and what are not, what I am getting at with that point, in that specific question is that they have raised the idea that books may be suitable for some

juveniles and not for others, therefore this law is overbroad, it is vague. What we want to get out is the criteria she would apply in deciding what juveniles, a book is suitable for and what juveniles it is not suitable for. It is not just going to be age, it is going

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C. Johnson - Cross

to be other things in addition to that. They would have the law specify a different criteria for each, for each level of juveniles, age or maturity.

THE COURT: Well, I mean, your statute is all encompassing. A juvenile under 18 is a juvenile. They don't differentiate between young adults or anybody else.

MR. MCLEES: That's exactly our point, Your Honor. The point is that it

would be impossible to do so with the sort of precision that they contend that the Constitution requires. And that's what I am going to point up with this witness, because--

THE COURT: But here again, that is a matter of legal argument at the conclusion of the case, and I don't see where it has any evidentiary significance at all. But I sustain the objection. And now that we have it out of our system, let's move on to something else.

MR. MCLEES: Very well, Your Honor.

BY MR. MCLEES: (Continuing)

Q. You mentioned that you have some books you regard as adults only books?

A. Those few Anonymous, yes.

Q. Are those the only ones?

A. Almost, yes.

Q. What percentage of your inventory do they constitute?

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C. Johnson - Cross

A. I have no idea. A tenth of a percent. Half a shelf.

Q. Are you aware that there has been a law on the books for several years making it legal to sell certain books to juveniles?

A. Yes.

Q. Sexually oriented?

A. Right.

Q. And you have tried to comply with that law?

A. Certainly.

Q. Have you ever been arrested for violating that law?

A. No.

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MR. MCLEES: Thank you, nothing further.

MR. PLOTKIN: No further questions, Your Honor.